

B. The Evidence is Insufficient to Prove Beyond a Reasonable Doubt That Mrs. Clinton Knowingly Made False Statements.

Two aspects of Mrs. Clinton's testimony warrant analysis: 1) Mrs. Clinton's testimony about whether she ordered or directed the Travel Office firings; and 2) Mrs. Clinton's testimony concerning her "role" or "input" in the decision to fire the Travel Office employees.⁹⁸⁴

The Independent Counsel has concluded that while Watkins's notes reflecting Mrs. Clinton's words -- "[W]e need those people out. We need our people in. We need the slots."⁹⁸⁵ -- could be construed as an order to fire the Travel Office employees, the evidence is nonetheless insufficient to prove beyond a reasonable doubt that Mrs. Clinton both said those words and that those words were intended to be such an order. Watkins would not testify that he understood those words to be such an order. The Independent Counsel has determined that Mrs. Clinton did play a role and have input in the decision to fire the Travel Office employees and that her testimony to the contrary was factually false. Despite that conclusion, the Independent Counsel believes that the evidence is insufficient to establish that Mrs. Clinton's statements regarding her role or input in the decision were knowingly false. Accordingly, the Independent Counsel has

⁹⁸⁴ H. Clinton Depo. 7/22/95 at 12; see also Statements of Mrs. Clinton to GAO and the House Committee, Section IV(B), supra. The Office examined one other aspect of Mrs. Clinton's testimony and determined that there was insufficient evidence to warrant prosecution. Mrs. Clinton testified that she was unable to recall the details of her discussions relating to the Travel Office matter with Thomason, Foster, and Watkins. H. Clinton Depo. 7/22/95 at 10-13. Proving that her testimony regarding her inability to recall the details of these brief conversations was false would be extremely difficult. From all evidence, Mrs. Clinton's conversations with Watkins, Foster, Thomason, and McLarty about the Travel Office between May 10 and May 19, though numerous, were not lengthy. Under the circumstances, this Office could not prove beyond a reasonable doubt that she did recall the details of these short conversations on a topic that was not within her primary area of responsibility. Conversely, the fact that these conversations occurred (and that all involved recall their general content) bears more appropriately on the principal factual question: whether Mrs. Clinton had a role or input in the Travel Office firings.

⁹⁸⁵ Watkins's notes 6/2/93, OIC Bates No. 542-DC-00001499.

exercised his discretion to decline prosecution and to discharge Mrs. Clinton from all criminal liability for alleged violations of federal criminal law within this Office's jurisdiction in the Travel Office matter.

1. Ordering the Firings.

Mrs. Clinton has repeatedly testified that she did not order the Travel Office firings or direct Mr. Watkins to fire the Travel Office employees. For example, the GAO asked Mrs. Clinton whether she asked or directed that any action be taken regarding the Travel Office matter.⁹⁸⁶ Mrs. Clinton denied that she directed that any action be taken.⁹⁸⁷

The only evidence supporting the allegation that Mrs. Clinton may have actually directed the Travel Office firings (other than the evidence relating to the May 14 telephone conversation) is (1) a conversation between David Watkins and Harry Thomason, in which Thomason recounted that Mrs. Clinton was "ready" to fire the employees, and (2) notes of another conversation with Harry Thomason, as retold to Matt Moore in preparing the Watkins Memorandum, that Mrs. Clinton wanted the employees fired. Mrs. Clinton, however, denied telling Thomason that she was ready to fire the Travel Office employees. And Thomason denied ever hearing Mrs. Clinton make any such statement. These denials apply equally to Watkins's recollection recorded in Moore's notes. Thus, the only evidence of that conversation is either Watkins's uncorroborated second-hand hearsay report of what Thomason told him about the first conversation or Moore's uncorroborated notes of another similarly uncorroborated, and, in this case, third-hand hearsay report of another conversation.

⁹⁸⁶ GJ 95-2 Exh. 254.

⁹⁸⁷ Mrs. Clinton's written responses to GAO's written questions 4/6/94, OIC Bates No. AJ-DC-00001520.

Watkins's hearsay reports of what Mrs. Clinton is alleged to have said -- and which Thomason and Mrs. Clinton now deny -- does not support a prosecutable case. Even in the unlikely event this evidence were admissible in a trial of Mrs. Clinton, Watkins did not consider these reports to be orders from Mrs. Clinton to fire the Travel Office employees and has testified on numerous occasions that Mrs. Clinton did not direct him to fire the employees. Watkins has consistently maintained that he was ultimately responsible for and made the decision to discharge the Travel Office employees.⁹⁸⁸ In light of Watkins's testimony and all other evidence, the Independent Counsel concluded that the record is insufficient to establish that Mrs. Clinton actually directed or ordered the Travel Office firings.

2. "Role" or "Input" in the Firings.

Mrs. Clinton gave sworn statements to the GAO, this Office, and Congress regarding the role she played (or more particularly, did not play) in the Travel Office firings. Because substantial evidence exists that portions of those statements were factually false, the Independent Counsel deems it in the public interest to explain why, despite that falsity, no prosecution of Mrs. Clinton is warranted.

a. Testimony of Mrs. Clinton.

GAO -- On April 6, 1994, Neil Eggleston submitted, on behalf of Mrs. Clinton, the following answers⁹⁸⁹ to questions posed by the GAO on behalf of Mrs. Clinton:

2. Mrs. Clinton was aware that Mr. Watkins was undertaking a review of the situation in the Travel Office, but she had no role in the decision to terminate the employees.

⁹⁸⁸ Watkins Int. 11/22/96 at 24.

⁹⁸⁹ The GAO asked if Mrs. Clinton "ask[ed] or direct[ed] that action be taken . . . in regard to the . . . Travel Office." GJ 95-2 Exh. 254. Mrs. Clinton's answer did not address whether she had "asked" anyone to take action -- a far broader concept than "direct."

3. Mrs. Clinton did not direct that any action be taken by anyone with regard to the Travel Office⁹⁹⁰

OIC Deposition -- On July 22, 1995, when asked who made the decision to fire the Travel Office employees, Mrs. Clinton testified:

Q: Who ultimately made the decision, to the extent that you know, to fire the employees from the Travel Office?

A: Well, the best I know is David Watkins and Mack McLarty, I assume, based on what I have learned since and read in the newspapers.

Q: Did you have any role in it?

A: No, I did not.

Q: Did you have any input with either Mr. McLarty or Mr. Watkins as to that decision?

A: I don't believe I did, no.⁹⁹¹

House Committee -- On March 21, 1996, Mrs. Clinton provided written responses, under oath, to questions posed to her by the House Committee on Government Reform and Oversight. Mrs. Clinton responded in relevant part to the congressional questions as follows:

Although I had no decision making role with regard to the removal of the Travel Office employees on May 19, 1993, I expressed my concern, as set forth above, that if there were fiscal mismanagement in the Travel Office or in any part of the White House, it should be addressed promptly. I am sure I felt such action could include, if necessary and justified, appropriate personnel actions so that this Administration would not be blamed for condoning any existing fiscal mismanagement problems, even though the Travel Office employees had been hired by previous administrations. I may have expressed to Mr. Foster and Mr. McLarty, and perhaps to Mr. Watkins, an interest in receiving information about

⁹⁹⁰ Mrs. Clinton's written responses to GAO's written questions 4/6/94, OIC Bates No. AJ-DC-00001520 at 1521.

⁹⁹¹ H. Clinton Depo. 7/22/95 at 9-12.

whether the review that was being conducted found evidence of financial mismanagement.⁹⁹²

b. Analysis.

The Independent Counsel believes there is substantial evidence to establish beyond a reasonable doubt that Mrs. Clinton had a "role" in the decision to fire the Travel Office employees and provided "input" into that decision. Mrs. Clinton's own sworn statement to Congress expressly acknowledges that she "expressed [her] concern . . . that if there were fiscal mismanagement in the Travel Office or in any part of the White House, it should be addressed promptly" and felt that "if necessary and justified, appropriate personnel actions" should be taken.

Those concerns were conveyed to senior White House staff and advisors. The evidence establishes conclusively that Mrs. Clinton had several conversations with Vince Foster, David Watkins, Mack McLarty, and Harry Thomason regarding the Travel Office. As recounted by these individuals, her comments -- considered fairly -- reflect the view that Mrs. Clinton desired that appropriate action be taken concerning the Travel Office employees, including their discharge if warranted. This desire, when communicated through intermediaries to David Watkins, caused him to feel pressure from Mrs. Clinton to act promptly and, ultimately, played a principal role in his decision to fire the employees.

In contrast, there is insufficient evidence to prove that Mrs. Clinton expressly asked or directed McLarty, Foster, or Thomason to communicate her views to Watkins in making his decision. In short, while there is some evidence that Mrs. Clinton knowingly intended to

⁹⁹² GJ 95-2 Exh. 8 at 5, 7-13.

influence Watkins's decision making, in the exercise of prosecutorial discretion, the Independent Counsel has concluded that that proof is insufficient that she in fact did so.

To establish that Mrs. Clinton intended to have such influence, the Office would be obliged to rely on the permissive presumption that an individual intends the natural consequences of her actions. In the Independent Counsel's view -- absent substantial corroborative evidence from witnesses within the White House -- reliance upon that presumption is inadequate to proceed with a prosecution. Although the evidence establishes that Mrs. Clinton's subordinates and advisors invoked her name -- in some cases, to serve their own interests -- and that in doing so they affected Watkins's decision to fire the Travel Office employees, the evidence is insufficient to establish her intent beyond a reasonable doubt.

The evidence that might permit a jury to conclude beyond a reasonable doubt that Mrs. Clinton was aware of her role or input is limited to the testimony of Watkins, McLarty, and Thomason, and Foster's notes, the sum total of which is not sufficient to establish beyond a reasonable doubt Mrs. Clinton's state of mind regarding her characterization of her actions as "role" or "input" in the decision. The only other evidence that might be persuasive -- Mr. Cloud's testimony about Watkins's golf course conversation with Mrs. Clinton -- is uncorroborated, probably inadmissible, and, in any event, appears to be a result of confusion by Mr. Cloud of Watkins's telephone conversation on May 14 with Mrs. Clinton and Watkins's telephone conversation with Patsy Thomasson on May 16.⁹⁹³ In light of these limitations, the Independent Counsel has concluded that insufficient proof exists to convince a jury beyond a

⁹⁹³ Watkins Int. 6/13/00 at 5.

reasonable doubt that Mrs. Clinton knew her testimony was false when given and that she knowingly gave false material testimony under oath to this Office or to Congress.⁹⁹⁴

Factual Falsity -- The evidence is sufficient to establish beyond a reasonable doubt that Mrs. Clinton had a "role" in the Travel Office firings and that she had "input" into that decision.⁹⁹⁵ The testimony of Thomason, McLarty, and Watkins supports this conclusion:

?? Harry Thomason testified that he had three separate conversations with the First Lady about the Travel Office before the firings.⁹⁹⁶ He also recalled conveying Mrs. Clinton's concern that "[i]f there is something wrong going on it should be dealt with" to Mr. Watkins.⁹⁹⁷

?? McLarty testified that he had two separate conversations with the First Lady about the Travel Office before the findings, one on May 13⁹⁹⁸ and one on May 16.⁹⁹⁹ After the May

⁹⁹⁴ It bears repeating that the same legal impediment to a prosecution for making false statements to the GAO as to Mr. Watkins would pose a similar obstacle to a prosecution of Mrs. Clinton. For this reason, and because Mrs. Clinton's GAO responses are subsumed within her written responses to Congress, we do not analyze the GAO responses independently. See Oakar v. United States, 111 F.3d 146, 153 (D.C. Cir. 1997) (holding that the decision in Hubbard v. United States, 514 U.S. 695 (1995) barred prosecution for false statements to Congress under 18 U.S.C. § 1001).

⁹⁹⁵ It might be argued that the term "role" is restricted in meaning to any formal role Mrs. Clinton might have had and that, inasmuch as Mr. Watkins was not within her "chain of command," she played no formal role, nor could have played a formal role in the decision to terminate the employees. The Office concludes that any such strained interpretation of the language used is contrary to commonsense and unlikely to be persuasive to a jury. The term "role" is defined as "a part or function taken or assumed by anyone," Webster's New International Dictionary, 1844 (Reference History ed. 1913), and is sufficiently broad to encompass an advisory role outside of the formal chain of authority. More importantly, however, in sworn deposition testimony, Mrs. Clinton broadened her denial to encompass a denial that she had any "input" in the decision to fire the employees. However crabbed an interpretation one might give to the word "role," it would be unpersuasive that the word "input" did not encompass the advisory role played by Mrs. Clinton.

⁹⁹⁶ Thomason GJ 7/17/96 at 125-31.

⁹⁹⁷ Id. at 133, 142.

⁹⁹⁸ McLarty GJ 7/31/96 at 24.

13 meeting he, too, conveyed Mrs. Clinton's "concerns" to Watkins, and Foster.¹⁰⁰⁰ And, he similarly reported his May 16 phone conversation with Mrs. Clinton to Foster and Watkins.¹⁰⁰¹

?? Foster's notes (although probably inadmissible hearsay) reflect that on May 13 he had two separate conversations with the First Lady about the Travel Office.¹⁰⁰² His notes reflect that he discussed Mrs. Clinton's views with McLarty and Watkins that same day.¹⁰⁰³

?? And, of course, Watkins testified that he had a telephone conversation with the First Lady on May 14, in which she told Watkins: "[W]e should have our people in there."¹⁰⁰⁴ Watkins reported the substance of his conversation with Mrs. Clinton to Foster and McLarty.¹⁰⁰⁵

Given the eight separate conversations in which Mrs. Clinton discussed the Travel Office with senior White House staff and advisors, the evidence demonstrates that Mrs. Clinton provided "input" to the staff regarding the Travel Office firings and played a "role" in their decision making process. It is, in the Independent Counsel's judgment, beyond peradventure that as a matter of historical fact, Mrs. Clinton's input into the process was a significant -- if not the significant -- factor influencing the pace of events in the Travel Office firings and the ultimate decision to fire the employees. Accordingly, the Independent Counsel concludes that Mrs.

⁹⁹⁹ Id. at 80.

¹⁰⁰⁰ Id. at 58-60; see also Foster Notes (210-DC-00000113); GJ 95-2 Ex. 164 (Watkins Notes).

¹⁰⁰¹ McLarty GJ 7/31/96 at 117-19.

¹⁰⁰² Foster's notes 6/3/93, OIC Bates Nos. 542-DC-00001016-1018, 1060-1067.

¹⁰⁰³ Foster's notes 6/3/93, OIC Bates No. 542-DC-000001017.

¹⁰⁰⁴ Watkins GJ 2/28/95 at 53.

¹⁰⁰⁵ Id. at 57.

Clinton's sworn testimony that she had no input into Watkins's decision or role in the Travel Office firings is factually inaccurate.

Intent -- Despite the foregoing conclusion, the Independent Counsel has determined that there is insufficient evidence to obtain and sustain a conviction of Mrs. Clinton for knowingly making material false statements under oath to this Office and Congress regarding her role in the Travel Office firings. To establish that Mrs. Clinton knowingly gave false testimony under oath to this Office, the United States would need to establish not only that the testimony was false, but that Mrs. Clinton knew the testimony to be false and knowingly gave that false testimony despite her awareness of its falsity. The admissible evidence will not support such a conclusion beyond a reasonable doubt.

Only four individuals -- Watkins, McLarty, Foster,¹⁰⁰⁶ and Thomason -- had direct contact with Mrs. Clinton relating to the Travel Office. Based on their testimony, the investigation has uncovered insufficient evidence that Mrs. Clinton asked or directed McLarty, Foster, or Thomason to communicate her views to Watkins in making the decision or that she directed Watkins to take her views into account. Nor did any of the witnesses provide sufficient evidence that McLarty, Watkins, Thomason, or Foster ever advised Mrs. Clinton of the impact that she had on the decision to fire the Travel Office employees.

¹⁰⁰⁶ Mr. Foster's death prevented the Office from interviewing him. For this reason, given the significance of the precise nature of his interactions with Mrs. Clinton, the Office pursued every available avenue for securing circumstantial evidence of those interactions. Several of Mr. Foster's notes were provided to this Office pursuant to subpoena. However one potentially critical set of notes -- reflecting Mr. Foster's conversations with his attorney, James Hamilton, shortly before his suicide -- were withheld by Mr. Foster's estate and the Office's efforts to compel access to those notes were rejected by the Supreme Court. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

Evidence that Mrs. Clinton, in her only direct communication with Watkins, had a direct and immediate impact on the decision to fire the employees -- the impact of which she could not have been unaware -- is either uncorroborated, inadmissible, or both. According to Watkins, his May 14 telephone conversation with Mrs. Clinton involved her saying that "we need our people in" the Travel Office. No other witness has testified that Mrs. Clinton said this at that time or at any other time. Harry Thomason denied that Mrs. Clinton told him that she was "ready to fire" the employees. He also did not recall his May 12 communication with Watkins that reflected an alleged conversation with Mrs. Clinton (contained only in Matt Moore's notes for the Watkins Memorandum -- which are probably inadmissible) regarding "our people" in connection with the Travel Office.

McLarty resisted characterizing Mrs. Clinton's involvement in the Travel Office as a "role" or "input."¹⁰⁰⁷ He also did not disclose any factual information regarding whether Mrs. Clinton wanted to replace the Travel Office employees with "our people."

Vince Foster's notes are both inconclusive and probably inadmissible. Although the notes reflect Foster's own conversations with Mrs. Clinton -- and are therefore corroborative of her having a "role" or "input"-- the notes twice reflect his concerns that Mrs. Clinton's role in the Travel Office was misperceived. In any event, the notes are probably inadmissible hearsay because they cannot be proven to be present sense impressions, a business record kept in the regular course of practice, or subject to the "residual exception" to the hearsay rule.¹⁰⁰⁸

¹⁰⁰⁷ McLarty responded to questioning about Mrs. Clinton's input by saying that input "is your word." McLarty GJ 7/31/96 at 88. He also denied that Mrs. Clinton had a role because the term "'role' implies an active participatory role in the discussion and decision of whether to use Peat Marwick." *Id.* at 91.

¹⁰⁰⁸ See Fed. R. Evid. 803(1), 803(6), and 804(5).

The only other evidence regarding Mrs. Clinton's direct communication with Watkins was Mr. Cloud's testimony regarding Watkins's golf course telephone call with Mrs. Clinton, after which Watkins allegedly said that he would have to fire the Travel Office employees. If Watkins's statement to Cloud itself were corroborated by other admissible evidence, that might constitute additional evidence that whatever Mrs. Clinton said in that conversation, it was sufficiently direct and forceful to cause Watkins to announce that he would have to fire the employees. However, the call itself, alleged to have occurred on May 16, is uncorroborated by telephone records.

Moreover, Watkins has stated that he believed that Mr. Cloud may have confused his conversation with Mrs. Clinton with his conversation with Patsy Thomasson. In his conversation with Patsy Thomasson, he has said, she reported on the Peat Marwick audit which may have provoked Watkins to utter the kind of profanities Mr. Cloud recalled concerning the firing of the Travel Office employees.¹⁰⁰⁹

Perhaps most importantly, Mr. Cloud had no way of knowing for certain to whom Watkins was speaking. To the extent that Mr. Cloud's testimony purported to report Watkins's statement about what Mrs. Clinton said, such testimony would be inadmissible hearsay at any trial of Mrs. Clinton. For Watkins's statement to be attributable to Mrs. Clinton, and therefore also admissible against her as a statement of a party opponent, the government must prove that Mrs. Clinton had authorized Watkins to make the statement;¹⁰¹⁰ that Watkins, in making the statement, was acting as Mrs. Clinton's agent and was acting in the scope of that agency;¹⁰¹¹ or

¹⁰⁰⁹ Watkins Int. 6/13/00 at 5.

¹⁰¹⁰ Fed. R. Evid. 802(d)(2)(C).

¹⁰¹¹ Fed. R. Evid. 802(d)(2)(D).

that Watkins and Mrs. Clinton were members of a conspiracy, and the statement was in furtherance of that conspiracy.¹⁰¹² The government cannot prove any of these scenarios as to Mrs. Clinton.

Finally, Watkins testimony about Mrs. Clinton's May 14 telephone conversation with him would be subject to impeachment for a number of reasons including: 1) his prior statements that Mrs. Clinton did not direct the firings and that the decision to fire them was his own; 2) his dismissal from the White House for using a presidential helicopter while examining a golf course as evidence of bias; and 3) his motive to retaliate for being reprimanded for his handling of the firing.

Mrs. Clinton, no doubt was aware that her interest, as expressed, had some effect on what resulted in the Travel Office firings. Certainly, the effect Mrs. Clinton's intervention had on others is circumstantial evidence from which a jury could infer that Mrs. Clinton intended to have such an effect. The direct testimony regarding her conversations with others could reasonably be construed as intending to affect Watkins's decision inasmuch as a jury could conclude that those conversations had a purpose. In other words, a jury could infer from the circumstantial evidence that Mrs. Clinton intended to have an effect on the firing decision because her actions in speaking to McLarty, Foster, Watkins, and Thomason are inconsistent with any other inference.

The jury could also infer from the evidence that Mrs. Clinton was aware of the effect she had on the White House staff. As a matter of law, the jury may presume (though it is not required to do so) that an individual intends the natural and probable consequences of her

¹⁰¹² Fed. R. Evid. 802(d)(2)(E); see Bourjaily v. United States, 483 U.S. 171 (1987).

actions.¹⁰¹³ Thus, a jury could conclude, based upon the available evidence, that Mrs. Clinton must have known that, in light of her status as First Lady and one of the President's principal advisors, her inquiries and statements to McLarty, Foster and Watkins about the Travel Office matter would invariably influence the ultimate decision made by White House staff members. And yet, Watkins himself questioned in the later drafts of the Watkins Memorandum whether Mrs. Clinton was even aware of the effect that she was having.

In sum, whatever a jury could or might do with this evidence, the limitations of the testimonial evidence that might firmly establish Mrs. Clinton's state of mind are, in the Independent Counsel's judgment, a substantial -- and in this case, determinative -- barrier to obtaining and sustaining a conviction. The ultimate burden on a responsible prosecutor is to present a case that will establish beyond a reasonable doubt all of the elements of an offense.

But the sufficiency of evidence is not simply a technical question. While evidence sufficient to sustain a conviction is a minimum prerequisite,¹⁰¹⁴ it is not, however, the sole factor to be considered. A prosecutor must also believe that "the person [charged] probably will be found guilty by an unbiased trier of fact."¹⁰¹⁵

Here, in the Independent Counsel's judgment, there are insufficient grounds on which to proceed with a prosecution. Although the evidence establishes that Mrs. Clinton's subordinates invoked her name and thereby affected Watkins's decision to fire the Travel Office employees, in the Independent Counsel's view, the remaining evidence of Mrs. Clinton's intent to have such

¹⁰¹³ 1 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions §17.07 (4th ed. 1990); see United States v. United States Gypsum Co., 438 U.S. 422 (1978).

¹⁰¹⁴ See Federal Rule of Criminal Procedure 29(a).

¹⁰¹⁵ United States Attorneys' Manual, Principals of Federal Prosecution § 9-27.220(B).

an effect (or awareness of having such an effect) is inadequate to secure a reasonable likelihood of conviction.

C. The Evidence is Insufficient to Prove Beyond a Reasonable Doubt that David Watkins or Others Obstructed Justice by Withholding the Watkins Memorandum.

The Independent Counsel also considered whether the evidence regarding the failure to produce the Watkins Memorandum until January 1996 to Congress and this Office warranted prosecution of Watkins for obstruction of either the Congressional investigation or this Office's investigation under 18 U.S.C. § 1503. After granting Matt Moore immunity to obtain relevant testimony regarding Watkins's role in withholding the memorandum, the Independent Counsel concluded that the evidence was insufficient to prove beyond a reasonable doubt that Watkins knowingly withheld the memorandum.

The evidence regarding Watkins's failure to produce the Watkins Memorandum to this investigation at the time Watkins appeared before the grand jury in February 1995 is insufficient to prove beyond a reasonable doubt that he knowingly obstructed this investigation. He was not asked in the grand jury his specific understanding of the subpoena and its requirement to produce Travel Office documents that would have included his memorandum. Accordingly, the evidence is insufficient to prove that Watkins knew that those documents were required to be produced.

* * * * *

Accordingly, in the exercise of his prosecutorial discretion, the Independent Counsel has determined not to present an indictment to the grand jury concerning the testimony or statements of William David Watkins, Hillary Rodham Clinton or others, or for any acts of alleged obstruction of justice arising out of this investigation.